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REVIEW ESSAY

The Substance of the New Legal Process

CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE
CREATION OF PUBLIC POLICY by William N. Eskridge, Jr.,† and
Philip P. Frickey.†† St. Paul, Minn.: West Publishing Co.,
1988. Pp. 937.

Reviewed by Daniel B. Rodriguez‡

The “new legal process” movement¹ identifies a fledgling group of public law scholars attempting to apply the key insights of modern public law theory² to contemporary public law issues and problems. As its name suggests, the new legal process movement builds on the scholarship of the so-called legal process school, named after Henry Hart and Albert Sacks’ celebrated manuscript on lawmaking and interpretation.³ At the center of the new legal process movement, Professors William Eskridge and Philip Frickey have contributed an agenda for further legislation

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1. The moniker “new legal process” is Robert Weisberg’s. Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983).

2. Some of the more provocative of these insights include applications of “representation” theory to legal issues such as federalism, see Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341; Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980), the economic, or “public choice” analysis of legislation and the legislative process, see *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988); Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988), the development of what Richard Stewart describes as “reconstitutive law,” see, e.g., Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341 (1988); Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986), the “pragmatic” or “practical reason” movement, see, e.g., Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Kronman, *Practical Wisdom and Professional Character*, SOC. PHIL. & POL., Autumn 1986, at 203, and the recovery of the civic republican tradition in constitutional discourse, see, e.g., *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

3. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

scholarship, both with their cases and materials on legislation and with the virtual avalanche of legislation scholarship that they have penned over the past few years.⁴ Theirs is an ambitious undertaking—to stimulate thought about crucial legislation issues within the new legal process framework.

Eskridge and Frickey concentrate their efforts on three themes that they see as basic to this movement: first, the antipluralist notion that lawmaking is “a process of value creation that should be informed by theories of justice and fairness” and not merely the accommodation of exogenously defined interests (p. 330); second, the view that “creative lawmaking by courts and agencies is needed to ensure rationality and justice in law” (pp. 330-31); and, finally, a belief in the “importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy” (p. 331). These themes represent a series of broad claims about the nature of legal thought and interpretation and, even more broadly, about political and philosophical theories of justice.

The first part of this review focuses on some of the salient features of Eskridge and Frickey's legislation materials. Part II discusses the authors' remarkable chapter on statutory interpretation. Part III examines how the new legal process relates to its namesake, the original legal process school. Finally, Part IV offers some general comments about the future of the new legal process. One of the great strengths of Eskridge and Frickey's efforts is their invitation to public law scholars to grapple with the difficult issues raised by this renewed interest in legislation and legislation scholarship. It is in that spirit that this essay proceeds.

4. See Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. (forthcoming, 1990); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) [hereinafter Eskridge & Frickey, *Legislation Scholarship*]; Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*]; Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) [hereinafter Eskridge, *Interpreting Legislative Inaction*]; Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*]; Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) [hereinafter Eskridge, *Politics Without Romance*]; Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*]; Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) [hereinafter Farber & Frickey, *Legislative Intent*]; Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) [hereinafter Farber & Frickey, *Public Choice*].

I

AN OVERVIEW OF ESKRIDGE AND FRICKEY'S *CASES AND MATERIALS ON LEGISLATION*

Eskridge and Frickey organize their book around a series of topics within the vast subject of legislation.⁵ The cases and copious note materials expose the tensions among several competing models of legislation and the legislative process. The materials offer a useful exploration of a variety of legislation issues including electoral structures, campaign financing, statutory implementation and interpretation, judicial review, direct democracy, and legislative drafting. While it is hard to quarrel with Eskridge and Frickey's choice and order of topics, commentators have suggested different emphases, both for the materials themselves and for the ideal legislation course.⁶ In any case, there is surely too much here for one course. Of course, this is hardly a criticism of the authors' efforts; one could readily imagine (law school bureaucracies willing) a set of courses based around the core materials provided by Eskridge and Frickey.

The introductory chapter introduces the three legislative models that serve as the basis for the rest of the materials. In Chapter one, Eskridge and Frickey begin by examining the so-called transactional or pluralist model of legislation.⁷ This model builds on traditional pluralist political science and, in its public choice form, the foundations of

5. Judge Posner's recent review of these materials contains a useful overview of their contents. Posner, Book Review, 74 VA. L. REV. 1567 (1988).

6. See Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1091-94 (1988) (criticizing Eskridge and Frickey for inadequate treatment of separation of powers issues); Posner, *supra* note 5, at 1569 (questioning the appropriateness of Chapter 2 on representational structures and Chapter 4 on judicial review). I disagree with Judge Posner's assessment of the chapter on "representational structures" which he describes as long and dull, focusing "on problems that are marginal to legislation." *Id.* The amalgam of topics contained in this chapter seems right where it belongs: in a legislation course. Indeed, one might fault traditional public law scholarship for its inordinate emphasis on judicial review of statutes rather than on analysis of particular representational structures and on suggestions for modifying these structures. See, e.g., Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 212-16 (1988).

7. The authors' description of the transactional/pluralist model relies upon M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); M. FIORINA, *CONGRESS—KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (1960); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983). While the core of the transactional model is attributed by the authors to Michael Hayes and James Q. Wilson, they note that Richard Posner introduced it into legal scholarship. See, e.g., R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 262-67 (1985); Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87) [hereinafter Posner, *Legal Formalism*]. Armchair historians will recall that the breakthrough article was Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

microeconomic analysis.⁸ It views the legislative process as a continuous series of bargains among competing interest groups and sees the legislative product as the final agreements hammered out by these factions. Eskridge and Frickey concisely describe the basic thrust of the pluralist view: the essence of the legislative function is the transformation of various exogenous preferences, identified through the active political participation of interest groups, into public policy. Eskridge and Frickey's account collects the relevant political science literature and provides an explanation for both the demand and supply of legislation as well as the formation of interest groups (pp. 46-56). Anyone familiar with the relevant literature will recognize the authors' brief description as a succinct, if sometimes sketchy, description of the basic pluralist view. For a generation of law students not steeped in the relevant political literature and accustomed to the basic legal process assumption of a legislature made up of "reasonable persons pursuing reasonable purposes reasonably,"⁹ the authors' tightly packaged discussion of the transactional model is quite useful indeed, if only as the presentation of an alternative point of view.

Against the backdrop of this transactional model, the authors provide a nice synopsis of the traditional legal process view as elucidated in Hart and Sacks' famous manuscript.¹⁰ Next, they introduce the new legal process model, a model centered around the three themes described above—anti-pluralism, creative lawmaking, and dialogic government. The authors describe these theoretical models in the first and third chapters, with the bulk of the note materials in the chapters on "Legislative Deliberation and Judicial Review" (Chapter 4), and "Statutory Interpretation" (Chapter 7) interweaving the new legal process themes through cases and problems. The presentation is balanced, clear, and interesting, and manages to collect together the most important recent work in public law theory, not only as it relates to specific legislation issues, but also as it relates to modern public lawmaking generally.

Eskridge and Frickey's decision to present a comprehensive collection of legislation topics necessarily means that some important topics receive relatively short shrift. For example, because the authors emphasize newer civic republican themes when discussing legislative deliberation and judicial review, they give only incomplete coverage to many of the important legal process contributions to this critical area (pp. 337-

8. The standard definition of public choice is Dennis Mueller's: "[t]he economic study of non-market decisionmaking, or simply the application of economics to political science." D. MUELLER, PUBLIC CHOICE 1 (1979). Useful introductions to the public choice literature include J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); Farber & Frickey, *Public Choice*, *supra* note 4, at 890-906.

9. H. HART & A. SACKS, *supra* note 3, at 1415.

10. See *infra* text accompanying notes 124-57.

67). Indeed, in their discussion of judicial review, Eskridge and Frickey cite no significant legal process scholarship, save for a brief Alexander Bickel quotation (p. 337),¹¹ that was written before 1975. Hence, they omit some of the key legal process-inspired work of an earlier era, including most of Professor Bickel's various works,¹² the Hart-Arnold debate on Supreme Court craftsmanship,¹³ Dean Wellington's article on constitutional adjudication¹⁴ and his article (with Professor Bickel) on the *Lincoln Mills* case,¹⁵ Gerald Gunther's equal protection foreword,¹⁶ Judge Learned Hand's essay on the bill of rights,¹⁷ and Herbert Wechsler's articles on neutral principles of constitutional law¹⁸ and on the political safeguards of federalism.¹⁹ A more complete description of new legal process approaches to legislative deliberation and judicial review would have examined their relationship to the legacy of the legal process movement, as well as to the legal process-inspired works of Jesse Choper²⁰ and John Hart Ely.²¹

Also incomplete is their treatment of statutory implementation. Their capsule summary of administrative law recounts many important recent developments, including the changing role of the administrative agency (pp. 456-63),²² the "new judicialism" (pp. 463-73),²³ and the

11. This passage is a quotation from A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962).

12. See generally A. BICKEL, *THE MORALITY OF CONSENT* (1975); A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. BICKEL, *supra* note 11.

13. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

14. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

15. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

16. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

17. L. HAND, *THE BILL OF RIGHTS* (1958).

18. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

19. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

20. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

21. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

22. In this regard, see Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 9 (R. Noll ed. 1985) (discussing contemporary organic and structural theories of agency behavior).

23. Eskridge and Frickey cogently describe the tensions in modern administrative law doctrine among different strategies for checking agency conduct (pp. 463-73). For a more extended discussion of these tensions, see M. SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988) (suggesting basic tension between synoptic and incremental approaches to agency decisionmaking); Hirschman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646 (1988) (criticizing recent administrative law and deregulation trends and proposing stronger role for courts); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter *Constitutionalism*] (analyzing characteristics

threatened rebirth of the delegation doctrine (pp. 473-82).²⁴ Yet they slight what is arguably the most significant development of all, the acceptance by courts and commentators of a greater role for politics in the administrative process.²⁵

During the Progressive era, and later during the New Deal, the prevailing conception of the administrative state was of a collection of autonomous, technocratic agencies, carefully separated from politics and all its effects.²⁶ There was, announced the Progressive era reformers, "no Republican or Democratic way to pave a street."²⁷ Political intrusion into the administrative matters of the various agencies was viewed as inconsistent with the model of scientific management fashionable in the

of post-New Deal agencies and advising greater control of administrative action by all three branches); Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258 (criticizing assumption of Smith's analysis of modern administrative law doctrine); Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427 (criticizing excessive judicialization of administrative proceedings).

24. The support for greater judicial constraints on statutory delegations to agencies is considerable. See, e.g., J. ELY, *supra* note 20, at 131-34; T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d ed. 1979); J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 78-94 (1978); Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657; Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295 (1987); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972).

One interesting line of inquiry that would fit nicely in the lacuna between the authors' discussion of statutory implementation and interpretation concerns the courts' recent efforts to construe statutes creatively in order to narrow otherwise (unconstitutionally?) broad delegations. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (the "Benzene" case) (narrowly construing the Occupational Safety and Health Act to avoid delegation doctrine challenge); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (same with regard to Economic Stabilization Act).

25. See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865 (1984) ("an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53 (1983) (Rehnquist, J., dissenting) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). See generally Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986) (generally supporting executive order vesting limited regulatory review authority in executive agency); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-23 (1985) (supporting greater political control on the grounds that "[t]he combination of explicit judicial approval of Presidential control of policy decisions made by independent agencies and judicial deference to those policy decisions can create a convergence of actual policy-making power with the public's perception of that power.").

26. The representative views of the respective periods are Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887); J. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). See generally D. WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* (2d ed. 1984) (discussing historical patterns in public administration).

27. Shapiro, *Prudence and Rationality Under the Constitution*, in *THE CONSTITUTION AND THE REGULATION OF SOCIETY* 213, 214 (1988).

early part of the 20th century,²⁸ and, while the rigorously scientific models of public administration were on the wane by the time of the New Deal, most New Dealers still felt that administrative agencies would be well advised, as a matter of "intelligent realism," to follow an industrial, rather than a political, analogue in developing regulatory policy.²⁹ This technocratic view of public administration was well-suited to both the political currents and the regulatory structure of those eras.

The New Deal agency model, however, has begun to break down in the eyes of many modern observers.³⁰ The assumption that modern public administration and regulation can be carried out neutrally and purely technocratically has declined along with the faith in the omnipotence of natural and social science as means to resolve difficult economic and social problems.³¹ The views of Woodrow Wilson and the Progressive era theorists and James Landis and the New Dealers seem anachronistic in light of modern public law theories that view administrative agency decisionmaking as a complex amalgam of rational calculation, statutory interpretation, political judgment, and translation of values into public policy.³² Accordingly, there is a role (although we may argue over exactly how large of one) for political judgment in the creation and implementation of regulatory policy.

As a practical matter, political control over the administrative process in the form of supervision by Congress and the President has increased dramatically in the past two decades. The setback occasioned by the Supreme Court's legislative veto decision³³ has hardly slowed Congress' drive to increase control over administrative decisionmaking through both legislative and non-legislative means.³⁴ Nevertheless,

28. See D. WALDO, *supra* note 26, at 49-63. "Scientific management" refers to a set of ideas identified with Frederick Winslow Taylor and his research in the area of manufacturing production systems. See F. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911).

29. J. LANDIS, *supra* note 26, at 11-12.

30. See sources cited in *supra* note 25.

31. This decline is described in Cooper & West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 867 (1988).

32. See M. SHAPIRO, *supra* note 23, at 142 ("[O]nce we begin to admit that policy must be made in the face of considerable uncertainty, we not only look for prudence but must acknowledge politics."); see also Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79 (1959).

33. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

34. See generally W. GORMLEY, *TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES* (1989); C. FOREMAN, *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* (1988); Fisher, *Micromanagement by Congress: Reality and Mythology* in *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 139 (G. Crovitz & J. Rabkin eds. 1989) (describing substitution of committee vetoes for legislative veto struck down in *Chadha*); Weinraub, *New Unity is Cited: Lawmakers Being Given Power of Virtual Veto Over the [Contra Aid] Program*, N.Y. Times, Mar. 25, 1989, at A1, col. 6 (describing unique appropriations authorization agreement).

Eskridge and Frickey essentially begin and end their discussion of "legislative alternatives to complete delegation of lawmaking to agencies and bureaus" with a description of the EPA-Gorsuch controversy ("L'Affair Gorsuch") and *Chadha* (pp. 488-511). But in addition to the subpoena duces tecum and legislative veto,³⁵ Congress has many important, and currently vital, means of political control, including oversight hearings,³⁶ budgetary control,³⁷ statutory revision that effectively cabins agency discretion,³⁸ and expanded control over agency personnel.³⁹ Moreover, commentators remind us not to mistake congressional inaction for agnosticism, for even in an era in which agencies appear more autonomous than ever, the specter of congressional control is omnipresent.⁴⁰

The executive branch has entered the picture to an unprecedented degree in the last two decades, vying with Congress for greater influence and control in modern public administration.⁴¹ As a means of controlling the direction of administrative agencies, recent presidents have

35. Louis Fisher has pointed out that, notwithstanding *Chadha*, Congress retains a number of legislative veto-like restrictions on the President's executive authority. L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 178-83 (1985). "With or without the legislative veto," remarks Fisher, "Congress will remain a partner in 'shared administration.' It is inconceivable that any court or any President can prevent it. Call it supervision, intervention, interference, or just plain meddling, Congress will find a way." *Id.* at 183.

36. See C. FOREMAN, *supra* note 34, at 32-87.

37. See J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 315-43 (1981); Kaiser, *Congressional Oversight of the Presidency* in 499 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 75 (R. Davidson ed. 1988).

38. The contrast between the broad delegations of the New Deal statutes and the narrower delegations contained in the new social regulation statutes of the 1960s and 1970s illustrates Congress' occasional willingness to constrain agency discretion through more precise statutory guidelines.

39. The extent of Congress' power over agency personnel remains somewhat ambiguous despite several pertinent Supreme Court decisions. See *Mistretta v. United States*, 109 S. Ct. 647, 673-75 (1989) (upholding Presidential power to remove, for good cause, Article III judges from service on the United States Sentencing Commission); *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (upholding limitation on Attorney General's power to remove independent counsel appointed pursuant to Ethics in Government Act); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating provision in Graham-Rudman-Hollings Act vesting authority to remove the Comptroller General in Congress); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (upholding "for cause" restriction on President's authority to remove Federal Trade Commissioner); *Myers v. United States*, 272 U.S. 52 (1926) (invalidating Congressional "advice and consent" role in removal of Postmaster General).

40. See Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (describing latent means by which Congress exercises control over Federal Trade Commission); Weingast, *Regulation, Reregulation and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147, 151-53 (1981); cf. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982) (despite "independent" nature, agencies are subject to effective presidential control).

41. See G. EADS & M. FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 107-39 (1984); S. TOLCHIN & M. TOLCHIN, DISMANTLING AMERICA: THE RUSH TO DEREGULATE 39-71 (1983); R. NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983); Pierce, *supra* note 25, at 507-13.

While it is too early to tell for sure, there are signs that the Bush administration will continue this course. See L.A. Daily J., Feb. 7, 1989, at 7, col. 3 ("Bush is planning to centralize control over

employed a variety of more or less effective methods of supervision, including review of proposed regulations to ensure that benefits outweigh costs,⁴² that they are consistent with principles of federalism,⁴³ and that they are faithful to the agencies' overall regulatory programs.⁴⁴ Moreover, the President maintains strong, even if not plenary, control over agency personnel.⁴⁵

Growing political control of the administrative process is the consequence of several complicated factors, including a more skeptical attitude toward the courts' capacity to supervise modern administration,⁴⁶ doubt concerning the comprehensive rationality assumption built into the New Deal agency model,⁴⁷ and the increasing competition between Congress and the President for influence over administrative agencies.⁴⁸ Because Eskridge and Frickey's topic is legislation and the legislative process, they should pay greater attention to political control of the implementation of legislation by all three branches, particularly in light of the continuing and inevitable clashes between Congress and the President over policy and policymaking authority and over the proper locus of administrative control.

regulatory policy in a new panel in the White House [T]he new panel would provide direct presidential involvement in regulatory policy decisions.").

42. Executive Order No. 12,291, 3 C.F.R. 127 (1982). For analyses of this controversial executive order, see Cooper & West, *supra* note 31; Strauss & Sunstein, *supra* note 25; DeMuth & Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Olson, *The Quiet Shift of Power: OMB Supervision of EPA Rulemaking Under E.O. 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984).

43. Executive Order No. 12,613, 3 C.F.R. 256 (1988). See generally Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93 (1983) (authored by C. Boyden Gray, Counsellor to President Bush).

44. Executive Order No. 12,498, 3 C.F.R. 323 (1986).

45. See sources cited *supra* note 25. On the future of presidential power after Morrison v. Olson, 108 S. Ct. 2597 (1988), see *Symposium: Separation of Power and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO. WASH. L. REV. 401 (1989); Rohr, *Public Administration, Executive Power and Constitutional Confusion*, 49 PUB. ADMIN. REV. 108 (1989); Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

46. See, e.g., J. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989); M. SHAPIRO, *supra* note 23, at 128-49; R. MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); Pierce, *supra* note 25, at 504-07. This skeptical view of judicial control is far from universally shared, however. See, e.g., Hirshman, *supra* note 23, at 666-76 ("Judicial review of agency action for conformity to law . . . plays an important role in keeping the system in the balance it requires."); Sunstein, *Constitutionalism*, *supra* note 23, at 463-78.

47. See M. SHAPIRO, *supra* note 23, at 146-49.

48. See J. SUNDQUIST, *supra* note 37, at 315-43. Morris Fiorina and Roger Noll have suggested one reason for this increasing competition: politicians covet agency influence insofar as it provides "easework," that is, opportunities for favor-dispensing from elected representatives to constituents. Consistent with the public choice explanation of political action, Fiorina and Noll believe that politicians favor casework as a means to improve their chances of being reelected. See Fiorina & Noll, *Voters, Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. POL. ECON. 239 (1978).

One of the messages Eskridge and Frickey could communicate with a strengthened chapter on statutory implementation is that the actual lawmaking process differs from the idealized one described in the civics textbooks in which Congress makes, the President executes, and the judiciary interprets the laws. In the modern administrative state, the process of law creation, implementation, and interpretation is a synergistic process involving an ongoing dialogue among all branches of government, including the headless fourth branch—the administrative agencies.⁴⁹ Just as modern public law scholarship correctly emphasizes the extent to which courts are and should be involved in the creation of legal meaning, so too do Congress and the President play their respective post-enactment roles in the development of legal rules and public policy. A view of the legislative process as a relay race in which Congress, having passed the statute, hands the baton to the President and he to the courts, is not only unrealistic, but also would deny each branch its constitutional role as an ongoing participant in the creation of statutory meaning.

II

STATUTORY INTERPRETATION AND THE NEW LEGAL PROCESS

The book's centerpiece is its chapter on statutory interpretation (pp. 569-828). As the materials reflect, the subject of statutory interpretation is enjoying a renaissance of its own. The past few years have brought theories of statutory interpretation by such disparate scholars as Ronald Dworkin,⁵⁰ Frank Easterbrook,⁵¹ Michael Moore,⁵² Guido Calabresi,⁵³

49. See Sunstein, *Constitutionalism*, *supra* note 23, at 483-91; Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (emphasizing importance of overlapping checks and balances in maintaining stable constitutional order). Cf. L. FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 233-47 (emphasizing the importance of inter-branch cooperation in the constitutional context: "Coordinate construction is more than a theory. Given the nature of our political system, it is a necessity.").

50. R. DWORKIN, LAW'S EMPIRE 313-54 (1986); R. DWORKIN, A MATTER OF PRINCIPLE 316-31 (1985).

51. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-15 (1984); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

52. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

53. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Dean Calabresi's project is actually a more specific one—to justify the overruling of anachronistic statutes in appropriate cases. Useful analyses of Dean Calabresi's provocative thesis include Weisberg, *supra* note 1; Cox, Book Review, 70 CALIF. L. REV. 1463 (1982); Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade* (Book Review), 82 COLUM. L. REV. 1752 (1982).

Richard Posner,⁵⁴ Jonathan Macey,⁵⁵ Alexander Aleinikoff,⁵⁶ J. Willard Hurst,⁵⁷ Earl Maltz,⁵⁸ M.B.W. Sinclair,⁵⁹ William Popkin,⁶⁰ and William Eskridge.⁶¹ Most of this scholarship operates within the traditional paradigm of legal positivism; that is, it incorporates the basic view that statutes are at root binding commands of the sovereign and, furthermore, that following these binding commands will require entities to construe and interpret such statutes. Some of this scholarship, however, attempts to dislodge the enterprise of statutory interpretation from its connection to legal positivism and, more specifically, from the longstanding debate between the two principal positivistic theories of statutory interpretation: textualism and intentionalism.⁶²

A. Positivistic Theories of Statutory Interpretation

Statutory interpretation doctrine continues to reflect a basic dichotomy between textualist and intentionalist interpretive approaches.⁶³

54. R. POSNER, *supra* note 7, at 286-93; Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 848-52 (1988) [hereinafter Posner, *Jurisprudence of Skepticism*]; Posner, *Legal Formalism*, *supra* note 7, at 179; Posner, *Statutory Interpretation—in the Classroom and the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

55. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (described *infra* text accompanying notes 93-99).

56. Aleinikoff, *Updating Statutory Interpretation*, 97 MICH. L. REV. 20 (1988). Professor Aleinikoff develops his theory around a "nautical" metaphor. "Congress builds a ship and charts its initial course," says Aleinikoff, "but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail." *Id.* at 21.

57. J. HURST, *DEALING WITH STATUTES* 65 (1982) (describing a legal process-like model: "The twentieth-century emphasis is on coming to a specific focus on a given statute in its full-dimensioned particularity of policy, rather than emphasizing material or values not immediately connected to that enactment.").

58. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988) (defending traditional intentionalist model with slight modifications).

59. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985) (developing theory based on Grice's "speech act" linguistic theory).

60. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988). Popkin stresses that the duty of a statutory interpreter is to make statutes "fit" into the fabric of the law. His collaborative model claims that "law is the result of public deliberation about public values in which courts play an active normative role," *id.* at 627, and also that "the meaning of documents is determined by criteria which vary with the political function of the document." *Id.*

61. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4.

62. Textualism and intentionalism were terms first employed by Dean Brest in the context of constitutional interpretation. Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U.L. REV. 204 (1980).

63. For recent cases that reflect the sharp differences between these two approaches, see, e.g., *Public Citizen v. United States Dep't. of Justice*, 109 S. Ct. 2561 (1989) (majority interprets statute by looking beyond statute's text to determine congressional intent while dissent relies on plain language of the statute); *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989) (majority argues that analysis of

Both are species of traditional legal positivism.⁶⁴ Textualism describes the view that the interpreter, presumably the court, is obliged to follow the words of the statute, even when faithfully following these words leads the interpreter in directions contrary to the apparent intent of the statute's framers as reflected in extrinsic sources of legislative history. The intentionalist, by contrast, pedigrees the intent of the statute's framers. While the language of the statute will often be the best indicator of the framers' intent, the text may not always reflect the true intentions of the enacting legislature. When the interpreter becomes convinced that the framers intended to enact something different than the words they used to describe their intention would indicate, the interpreter is obliged to follow the framers' intent instead of the text.⁶⁵

Both of these views are built on the core positivistic assumption of legislative supremacy;⁶⁶ accordingly, both are will-centered views, conceiving the task of statutory interpretation to be the revelation of legislative will. Troublingly, from the standpoint of doctrine and theory,

legislative history of statute claimed to abrogate state sovereign immunity is irrelevant while dissent looks to the text, structure, and legislative history of the statute to divine congressional intent); *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 109 S. Ct. 1814 (1989) (majority looks only to text of statute in determining duty to represent indigent defendants while dissent looks to Congress' intent in passing the statute); *Chan v. Korean Air Lines*, 109 S. Ct. 1676 (1989) (majority looks only to the text of the Warsaw Convention while concurrence looks also to the legislative history); *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988) (majority looks to the statute's text while the dissent closely examines the statute's legislative history).

64. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES 7-12* (1975) (describing positivistic assumptions underlying statutory interpretation doctrine); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 896 n.39 (1982) ("By refusing to inquire into what words ought to mean, regulatory law is inherently instrumentalist and hence positivist.").

65. The most familiar method of intentionalist statutory interpretation begins with resort to traditional indices of legislative history. Fidelity to legislative history and intentionalism are not synonymous, however. Hart and Sacks' theory of statutory interpretation is the most notable example of an avowedly intentionalist approach which, in contrast to the historical approach most prevalent in modern judicial doctrine, directs the interpreter to follow the purpose of the statute instead of the "intention of the legislature." H. HART & A. SACKS, *supra* note 3, at 1410-17. Hart and Sacks offer a "concise statement of the task" of statutory interpretation, a statement which, developed at length in their materials, represents the legal process school's basic theory of statutory interpretation:

In interpreting a statute a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either —
 - (a) a meaning they will not bear, or
 - (b) a meaning which would violate any established policy of clear statement.

Id. at 1411. More recently, Solicitor General (and former judge) Kenneth W. Starr and Professors Farber and Frickey have offered two separate brands of modified intentionalist approaches. Both approaches are skeptical of legislative history as the sole guidepost to determining the intent of the legislature. See Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1988); Farber & Frickey, *Legislative Intent*, *supra* note 4.

66. The assumption of legislative supremacy is, of course, central to our constitutional

acceptance of this positivistic premise does not, and cannot, help us determine how we should reveal this will. In other words, positivism *simpliciter* cannot tell us whether to be textualists, intentionalists, modified intentionalists or anything else. While the central assumptions of legal positivism mandate that a plausible theory of statutory interpretation must be will-centered, positivism cannot itself generate a theory of statutory interpretation.

In light of this dilemma, the debate between textualists and intentionalists proceeds almost entirely in pragmatic terms. By now, we know the critical moves by instinct.⁶⁷ The modern textualists, particularly those advocates of the so-called "plain meaning" approach, claim that the traditional indices of legislative history are unreliable as guides to legislative intent. This is apparently the crux of Justice Scalia's criticism.⁶⁸ Others stress, as did Max Radin nearly sixty years ago,⁶⁹ that the notion of a collective legislative intent, in trying to ascribe a particular point of view to 535 separate individuals, is conceptually incoherent.⁷⁰ Conversely, the leading arguments for intentionalism reflect a version of the epistemological claim that no text is "plain"; words are inherently

understanding of separation of powers and the judicial role. See THE FEDERALIST No. 78, at 78 (A. Hamilton) (R. Fairfield 2d ed. 1981) ("It can be of no weight to say that the courts may substitute their own pleasure to the constitutional intentions of the legislature."); THE FEDERALIST No. 83, at 256 (A. Hamilton) (R. Fairfield 2d ed. 1981) ("The rules of legal interpretation are rules of *common-sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived.") (emphasis in original).

67. A good recent example of the debate between textualists and intentionalists in a statutory interpretation decision of the Supreme Court is *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989). Compare *id.* at 2566 n.9 (Brennan, J.) ("Nor does it strike us as in any way 'unhealthy,' or 'undemocratic,' to use all available materials in ascertaining the intent of our elected representatives.") with *id.* at 2576 (Kennedy, J., concurring in the judgment) ("Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.").

68. See, e.g., *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994-95 (Scalia, J., concurring) ("The meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can be shown to have been understood by a large handful of the members of Congress. . . ."); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1224 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect."); *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7 (D.C. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill."). See generally Farber & Frickey, *Legislative Intent*, *supra* note 4, at 437-44 (describing Justice Scalia's critique).

69. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). See also R. DICKERSON, *supra* note 64, at 71-79 (describing Radin's arguments).

70. Michael Moore, for example, criticizes as "rather crazy" the position that a legislature can have an intention just as a person could. Moore, *supra* note 52, at 348. See also Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 265-70 (1981).

susceptible to multiple meanings and, therefore, without resorting to intentionalist evidence we would be abdicating our responsibility to be faithful to the will of the legislature.⁷¹

The best versions of the textualist and intentionalist arguments are framed elegantly and persuasively. Neither argument, however, ultimately refutes the other's position. All the textualist proves with her legislative history arguments is that the way legislators currently explicate their collective intent, and the way courts interpret this intent, is deeply flawed. More often than not, this is not an argument against intentionalism but merely a brief against uncritical adherence to the traditional indices of legislative intent.⁷² And the intentionalist's argument challenges only one version of textualism—the plain meaning approach—leaving intact the basic insight of textualist theory: that statutory interpretation means the interpretation of a text and not an extrapolation of the purpose or the intent of the text's authors. As methodological categories, therefore, textualism and intentionalism ultimately prove slippery. After all, textualism merely requires that the interpreter obey the statute's text above all else, without describing what it means to interpret a text; and intentionalism obliges her to follow the framers' intentions, but offers little guidance to help her unearth this intent.⁷³

This is not to suggest that the critiques are of no use, or that there is little at stake in the conflict. The point is that the principal struggle between judges and scholars operating within the positivistic paradigm is cast in pragmatic, rather than theoretical, terms. This guarantees that the quest for a "better" theory of statutory interpretation will be, by and large, a quest for a better way of revealing the will of the enacting legislature.

The growing dissatisfaction with the continuing debate between textualists and intentionalists and, more generally, with legal positivism, is reflected in two different sorts of scholarly currents. The first is concerned with emphasizing the impact on interpretation theory wrought by

71. See Farber & Frickey, *Legislative Intent*, *supra* note 4, at 453-61.

72. And while Radin's collective intent argument is forceful, it is a critique not unique to intentionalism. Textualist views, too, rely on adherence to a specific set of words as the best evidence of the legislature *qua* legislature's will; indeed, all positivistic theories ultimately rely on the assumption that there are better and worse approaches to determine legislative will.

73. In characterizing the basic arguments for and against textualism and intentionalism I understand that I am oversimplifying what are in fact complex arguments and avoiding altogether the important debate over interpretation and what Michael Moore describes as "the interpretive turn in modern theory." Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989). Whether and to what extent the interpretivism of scholars such as Stanley Fish and Richard Rorty are, at root, anti-positivist and therefore at odds with each version of traditional will-centered approaches to statutory interpretation is an interesting and important question, but one beyond the scope of this essay.

the economic, or public choice, analysis of legislation, and the second, with directly attacking the core positivistic premise underlying the legislative and judicial processes and replacing will-centered theories with more dynamic approaches.

B. Statutory Interpretation and the Economic Theory of Legislation

Eskridge and Frickey's chapter on statutory interpretation vividly illustrates the impact the public choice critique⁷⁴ has had on legislation scholarship and, in particular, on the debate surrounding statutory interpretation. Paradigmatic of the economic theories is Judge Frank Easterbrook's approach,⁷⁵ which builds on the foundational insights central to the transactional model of legislation described ably by Eskridge and Frickey elsewhere in the book (pp. 51-56). Judge Easterbrook counsels an extremely narrow space for statutory interpretation: "Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute's domain."⁷⁶ Express resolution is a synonym for plain meaning. Where the legislature enacts "some sort of code of rules, the code will be taken as complete."⁷⁷ Congress need not enact a complete code, however; it may expressly delegate to the courts the power of common law revision, or the power to make law interstitially, both of which authorize the courts to create a body of law governing subsequent disputes under the statute. Easterbrook's example of such a delegation is the Sherman Antitrust Act where the courts' charge to "apply" the antitrust act is more realistically a charge "to create new lines of common law" to carry out the broad mandates of the statute.⁷⁸

Easterbrook maintains that the universal application of *any* rule of construction encourages the legislative process to operate more efficiently: "[r]ules are desirable not because legislators in fact know or use them in passing laws but because rules serve as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them."⁷⁹ Moreover, Judge Easterbrook maintains that his *particular* rule of construction "best approximates the choice legislators would reach if they could select an option . . . at no cost."⁸⁰

Eskridge and Frickey deftly describe how the same basic economic

74. See *supra* notes 7-8.

75. See Easterbrook, *Statutes' Domain*, *supra* note 51.

76. *Id.* at 544.

77. *Id.* at 545.

78. *Id.* at 544.

79. *Id.* at 540.

80. *Id.* at 552.

model may lead to very different approaches to interpretation by contrasting Easterbrook's approach with the theory of statutory interpretation defended by his colleague, Judge Richard Posner.⁸¹ Posner is an intentionalist. Calling his proposed method "imaginative reconstruction," he proposes that the judge "put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."⁸²

Posner's brand of intentionalism draws sustenance from his own theory of legal interpretation, the linchpin of which is his so-called "jurisprudence of skepticism."⁸³ Posner contrasts his skeptical view of legal reasoning and interpretation with legal formalism and its various modern incarnations.⁸⁴ Unlike legal formalists who apply scientific principles of exact inquiry and logical deduction to legal disputes, Posner suggests that legal reasoning is basically practical reasoning.⁸⁵ While not a single analytical method, practical reason is made up of a number of elements, including use of authority, reasoning by analogy, interpretation, means-end rationality, and tacit knowledge.⁸⁶ With these methods, Posner's "skeptical judge" tries to reach the most reasonable result in the circumstances, where what is reasonable is not deduced viz. the scientific method but rather is determined in accordance with practical and political considerations, leavened by a considerable amount of ontological skepticism.⁸⁷ Posner ties this sanguine conception of legal reasoning to his economic analysis of law by stressing the degree to which the economic approach is essentially descriptive and empirical rather than metaphysical.⁸⁸

Just as Posner recoils from conceptions of law as a rigorously deductive and logical system, he rejects a syllogistic approach to interpreting statutes, an approach which consists largely of "stringing together canons of statutory construction."⁸⁹ Posner asserts that legislation contains "purposive utterances" and that statutory interpretation requires interpreters to discern these purposes from text and context in order to advance the "cooperative enterprise set on foot by the enactment."⁹⁰

81. See sources cited *supra* notes 7 & 54.

82. R. POSNER, *THE FEDERAL COURTS*, *supra* note 7, at 286-87.

83. See Posner, *Jurisprudence of Skepticism*, *supra* note 54.

84. *Id.* at 830-37, 858-61.

85. *Id.* at 837-41.

86. *Id.* at 841-58.

87. *Id.* at 866-71. Judge Posner locates this skepticism in the "pragmatism" of Charles Pierce and the logical positivism of A.J. Ayer.

88. *Id.* at 871.

89. *Id.* at 851.

90. *Id.*

Judge Posner compares statutory interpretation to the decoding of communications issued by military commanders to soldiers in the field.⁹¹ The judge is like the field commander who "will ask himself, if he is a responsible officer: What would the commander have wanted me to do if communications failed?"⁹² Such imaginative reconstruction is consistent not only with the assumptions underlying the creation of the statutory commands but also with the nature of the interpreter's role.

While Posner counsels cautious restraint, the same economic-pluralist model of legislation has given rise to considerably more "activist" theories of statutory interpretation. Jonathan Macey, for example, ascribes a quite active interpretive role to courts precisely on the grounds that "checking legislative abuse is an institutional by-product of the judiciary's traditional role as interpreter of statutes in the resolution of specific legal disputes."⁹³ Macey proposes that courts employ traditional methods of statutory construction to enforce public-regarding aspects of the legislative deals struck by the legislature.⁹⁴ To be sure, Macey acknowledges that the principal aim of a statute will be to memorialize bargains made by various private interests and re-election minded legislators.⁹⁵ Nonetheless, the independent judiciary is well-placed, indeed, duty-bound, to "place[] subtle pressures on Congress to act in ways that benefit the public."⁹⁶ Courts, says Macey, may legitimately employ means such as forcing Congress "to spell out more clearly the terms of its bargains with special interest groups," to ensure that ostensibly public-regarding statutes will be interpreted and implemented as such.⁹⁷ The principal effect of such a strategy is to raise the costs of interest group activity.⁹⁸ For interest groups to succeed in reaping private gains at public expense in Macey's world, they would have to convince legislators to support their interest-group bargain solely as a private deal, with all the political risk that entails.⁹⁹

91. Posner, *Legal Formalism*, *supra* note 54, at 188-90.

92. *Id.* at 190.

93. See Macey, *supra* note 55, at 226.

94. *Id.* at 261-66.

95. This premise is central to the economic theory of legislation. See sources cited *supra* notes 7-8 and accompanying text.

96. Macey, *supra* note 55, at 267.

97. *Id.* at 265.

98. See Landes & Posner, *supra* note 7, at 877.

99. Macey explains the presence of ostensibly public-regarding legislation as by and large a tactical decision on the part of organized interests to forego the larger transaction costs associated with opposing the enactment of high-profile legislation (e.g., environmental laws), instead concentrating on the *implementation* of this legislation. Macey, *supra* note 2, at 50-51. Moreover, Macey asserts that interest groups may "*prefer* to obtain their goals through the enactment of legislation that is *seemingly* public-regarding" insofar as such legislation may be enacted at a lower cost than private-regarding legislation. *Id.* at 51 (emphasis added) (footnote omitted). See also

While advocates of the economic model of legislation have accompanied their pessimistic accounts with comprehensive theories of statutory interpretation, it is important to note that none of these elaborate theories are generated by the economic assumptions that underlie the basic model. In other words, the public choice account of how statutes come to pass cannot necessarily instruct judges as to how to interpret the statutes once created. To be sure, a normative pluralist would presumably favor an interpretive approach that gave salient effect to the bargain struck by these interest groups.¹⁰⁰ But, as the textualist-intentionalist debate illustrates, asserting that judges should follow the legislature's will is itself contentless; the difficult project is to create a theory to explain *how* courts should divine the legislature's will (or, to have it Posner's way, how courts should "decode" the legislature's communications). And nothing in the corpus of the economic model of legislation can provide a way to answer this question.

What public choice does provide, however, is a rather pessimistic account of the legislative process and hence reasons to doubt that our elected representatives can, or do, formulate any overarching will or purpose in enacting statutes. If, as the economic model of legislation suggests, statutes are nothing more than memorializations of bargains struck by (unelected) interest groups, then enforcing the legislature's will means nothing more than enforcing the will of the relevant interest groups. If so, the force of the positivistic premise is considerably weakened; after all, why should we prefer the will of a group of self-interested pressure groups to the will of judges?¹⁰¹

C. *Beyond Positivism: The "Dynamic" Approaches*

A number of important legal scholars have attempted to break statutory interpretation away from its positivistic moorings. While Eskridge and Frickey label such approaches dynamic, they attempt no comprehensive explanation of how these so-called dynamic theories differ conceptually from traditional and economic views. They illustrate this category by way of example, taking the reader through a brief tour of important recent theories including Professor Dworkin's theory of law as interpretation and Eskridge's own approach (pp. 513-17).

These dynamic approaches are both anti-skeptical and anti-pluralist.

Macey, *supra* note 55, at 250-56; Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORGANIZATIONS 81 (1985).

100. See, e.g., Landes & Posner, *supra* note 7.

101. Cf. Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 399 (1988) ("The Court is correct in its concern to police legislative infringements of the political rights of minorities, because there is nothing inherent in the legislative or representative process that prevents such infringement.").

Unlike the economic models which view political institutions as largely reactive and ineffectual against the pull and tug of exogenous interests, the dynamic theories embrace a considerably more aspirational vision of lawmaking and legal interpretation. To Dworkin, for example, the judge construing a statute is a participant in an ongoing process of creating meaning. The meaning of a statute will evolve and a judge "will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."¹⁰² Eskridge and Frickey describe Dworkin's approach as a dynamic form of statutory interpretation and use this "chain novel" approach to introduce their discussion of Eskridge's own recent approach introduced in a 1987 article entitled *Dynamic Statutory Interpretation*.¹⁰³

Dynamic statutory interpretation is an eclectic approach that ambitiously seeks to integrate the insights of literary theory,¹⁰⁴ public choice,¹⁰⁵ and, in particular, the interpretation theory of Hans-Georg Gadamer,¹⁰⁶ into a holistic, and expressly normative, theory of how statutes should be interpreted. The model has several basic tenets:

(1) Both textualist and intentionalist approaches impose "unrealistic burdens on judges, asking them to extract textual meaning that makes sense in the present from historical materials whose sense is often impossible to recreate faithfully."¹⁰⁷

(2) These approaches are also philosophically impoverished, relying on an outmoded conception of the nature of interpretation.¹⁰⁸ Interpretation is not, as traditional theories posit, "an archeological discovery, but a dialectical creation."¹⁰⁹ "Interpretation," says Eskridge, "is a contemporary interpreter's dialogue with the text and with the tradition that surrounds it."¹¹⁰

(3) This dialectic "involves the present-day interpreter's understanding and reconciliation of three different perspectives" including the

102. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 50, at 313.

103. See Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4.

104. See *id.* at 1510-11. Eskridge grounds his theory in part in the new jurisprudence of interpretation and in what he labels "the historiographical model of dynamic historical interpretation." *Id.* at 1510. The principal sources include White, *The Text, Interpretation and Critical Standards*, 60 *TEX. L. REV.* 569 (1982); Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373 (1982); Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 *RUTGERS L. REV.* 676 (1980).

105. See Eskridge, *Politics Without Romance*, *supra* note 4.

106. See Eskridge, *Gadamer/Statutory Interpretation* (unpublished manuscript on file with the author); Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1509. Eskridge relies principally on H. GADAMER, *TRUTH AND METHOD* (G. Borden & J. Cumming trans. 1975).

107. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1482.

108. *Id.* at 1506-11.

109. *Id.* at 1482.

110. *Id.* at 1509.

statute's text, the expectations of the enacting legislature, and the subsequent evolution of the statute and its present context.¹¹¹

(4) There is a hierarchy of perspectives beginning with the textual perspective (“[w]hen the statutory text clearly answers the interpretive question . . . it normally will be the most important consideration”),¹¹² followed by the historical perspective (“the historical expectations of the enacting legislature are entitled to deference”),¹¹³ and, finally, the evolutive perspective (applies “when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law”).¹¹⁴

From this framework, Eskridge develops a fascinating account of statutory interpretation in operation, discussing how intricate statutes such as the Civil Rights Act of 1964 evolve and how courts confronted with difficult questions, such as affirmative action,¹¹⁵ should construe such legislation dynamically to reconcile the statute's best purposes with society's best goals.¹¹⁶

Despite Eskridge's sophisticated and prodigious effort, his dynamic view suffers from a serious paradox. Eskridge claims that creativity is triggered only where the statute is unclear: “The textual perspective should be the critical one in many cases, because of rule-of-law values that statutes enacted by the majoritarian legislature be given effect and that citizens have reasonable notice of the legal rules that govern their behavior” (p. 616).¹¹⁷ The so-called rule-of-law values hearken back to traditional liberal democratic theory and the separation of powers notion that courts are obliged to follow the laws enacted and implemented by the elected branches.¹¹⁸ But, critically, none of these rule-of-law values

111. *Id.* at 1483.

112. *Id.*

113. *Id.* at 1483-84.

114. *Id.* at 1484.

115. An interesting contrast is provided by Dworkin's discussion of statutory interpretation and the Civil Rights Act in an essay entitled *How to Read the Civil Rights Act*. See R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 50, at 237. Eskridge contrasts his approach with Dworkin's in Eskridge, *Dynamic Statutory Interpretation*, *supra* note 4, at 1549-54.

116. In later works, Eskridge applies his dynamic model to the situation in which a court must consider whether to overrule a statutory precedent. Eskridge, *Overruling Statutory Precedents*, *supra* note 4. Eskridge also tackles the question of whether and to what extent a court should infer anything substantial from legislative inaction over a period of time. Eskridge, *Interpreting Legislative Inaction*, *supra* note 4.

117. Michael Moore describes in detail these rule-of-law values in Moore, *supra* note 52, at 313-20. They include separation of powers, equality and formal justice, liberty and notice, substantive fairness, procedural fairness, utility and efficient adjudication, and consequentialist virtues. While Eskridge does not explain what he means by the so-called rule-of-law values, I take it that his list would run along lines similar, if not parallel, to Moore's.

118. Eskridge makes this point more explicitly in a recent article: “The principle of legislative supremacy suggests that public values ought not be able to displace the apparent meaning of a clear statutory text which is reinforced by similarly clear legislative history.” Eskridge, *Public Values*,

that ostensibly obligate fidelity to the statute's text where it is clear spring from the same general theoretical framework that gives the dynamic theory force. If Eskridge is correct in describing the interpretive process as a dynamic one in which courts reconcile text, history, public policy and other goals, then why should the court *ever* simply apply the "plain meaning" of the statute and settle a dispute accordingly? Surely the rule-of-law virtues are not reason enough; after all, the political and philosophical foundations of the so-called rule-of-law reasons for fidelity to a statute's text, if taken seriously, may lead toward a considerably less "dynamic" view of statutory interpretation. And, conversely, the foundations of the dynamic approach expressly deny the democratic explanation for following a clear, recent statute.¹¹⁹

Nothing in Eskridge's theory explains the disjunction between using purely positivistic approaches to interpretation in the easy cases—where a recently-enacted statute speaks plainly and no strong policy choices counsel another result—and non-positivistic approaches in other situations.¹²⁰ Dynamic statutory interpretation is thus an incommensurate hybrid of different conceptions of law and interpretation. Dworkin's approach might seem similarly troubled; however, Dworkin supports his theory of statutory interpretation with an entire theory of law and interpretation.¹²¹ So, too, does Michael Moore in developing a natural law theory of interpretation.¹²² Eskridge's theory has no such building-block theory (at least not as part of his statutory interpretation framework) and, consequently, his dynamic view is not lodged to any general conception of law and interpretation that would explain away what seems like a fundamental flaw: its inability to tell us why a court empowered to approach statutes dynamically should be tethered to the language and history of a statute *at all*.¹²³

supra note 4, at 1062. He proceeds to reconcile the Supreme Court's use of public values in statutory interpretation with this important value of legislative supremacy.

119. Why, to put the point more bluntly, would a dynamic interpreter believe that she was *ever* obligated to follow blindly the will of Congress? Such obedience, albeit applicable in Eskridge's schema only in those circumstances where Congress has spoken recently and unambiguously about a particular statutory subject, is certainly far removed from the process of "dialectical creation" endorsed by Eskridge.

120. Alex Aleinikoff who, with his "nautical" approach, describes the rudiments of an approach to interpretation similar to Eskridge's, expressly reserves the question of how he would deal with recent statutes. Aleinikoff, *supra* note 56, at 61 n.160.

121. See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 50.

122. See Moore, *supra* note 52.

123. As this essay goes to press, Eskridge is in the process of developing a building block theory around the hermeneutics of Hans-Georg Gadamer. See *supra* note 106. The crux of Gadamer's contribution, as understood by Eskridge, is the notion that interpretation "is a search for the shared truth of text and interpreter, mediated by common historical tradition," Eskridge, *supra* note 106, at 6, and, as such, cannot be reduced to the positivistic search for either the meaning of the text or the intentions of the text's authors. So viewed, statutory interpretation is neither purely historical nor analytical, but conversational: a "critical activity" participated in by the authors and interpreters.

III THE NEW LEGAL PROCESS AND THE LEGAL PROCESS TRADITION

In the preface to their book on "law in courts," a representative legal process casebook of the mid-1960s, Paul Mishkin and Clarence Morris described the nature and scope of their project:

"Legal Realism's" major battle has been won. Nowadays only the most professionally naive believe that courts mechanically apply prefixed law to simon-pure facts. . . .

Unfortunately, the lesson taught by the realists is sometimes overlearned. The recognition of judges' humanness and the rejection of mechanical theories of the judicial process is then seen as implying that judicial choice ranges entirely free and that courts are seldom, if ever, hampered in doing just precisely as they wish. Moreover, this view is often coupled with the implicit assumption that this is as things must be—that there can be no effective limits on the power of judges. From such a position, the question of proper limits of course becomes irrelevant.

We think these latter inferences wrong. We believe that judicial action functions within limits of both power and propriety — limits that are rarely narrow or rigid, but important limits nonetheless. These bounds are found in the judicial institution and its processes, in the conception of the judge's task and how it is properly done.¹²⁴

The legal process movement of the post-war era assumed the task of reconciling the judiciary's power with its institutional role in precisely the way suggested by Professors Mishkin and Morris.¹²⁵ The movement's basic instigator was the legal realist critique which presented two forceful, and ultimately persuasive, challenges to our faith in the mechanical and apolitical legal reasoning model of classical legal thought.¹²⁶ Legal realism left us with a dilemma: On the one hand, the realists persuasively demonstrated that mechanistic legal reasoning does not by itself provide effective limits to judicial power; if judges could not rely on a determinate, a priori process of legal reasoning, what institutional or structural mechanisms remained to ensure that judges would

As Eskridge's approach is still forming, it is too early to tell whether his effort to link Gadamer with contemporary statutory interpretation doctrine and theory will succeed and whether it will resolve the paradox implicit in his applied "dynamic" theory explicated in his earlier works.

124. P. MISHKIN & C. MORRIS, *ON LAW IN COURTS: AN INTRODUCTION TO JUDICIAL DEVELOPMENT OF CASE AND STATUTE LAW* xi (1965).

125. By far the most extensive historical analysis of the legal process movement is Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J. L. REF. 56 (1988). The following discussion has benefited from Professor Peller's fine essay.

126. See generally L. KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986) (tracing development of legal realism and concluding that legal realism movement failed to deliver on its promise); Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 467 (1988).

stay within discernible bounds? On the other hand, legal realism challenged the very nature and scope of judicial *power*. "If," says Akhil Amar, "as the realists insisted, such decisions often turned on controversial choices, by what right did unelected federal judges ever displace the policy decisions of Congress or of state judges and legislators?"¹²⁷ What, asked the realists, are the limits on judicial power once authority is freed from the fetters of classical legal reasoning and, conversely, what is the basis, and hence justification, of the exercise of judicial power in the first place?

In the late 1950s and early 1960s, a group of jurists and public law scholars struggled to rescue adjudication from this dilemma. Lon Fuller, for instance, argued that the law had an inner morality—a "morality of process."¹²⁸ It was this inner morality of the adjudicative process—its remarkable ability to resolve non-polycentric disputes "by rational derivation of standards traced to the imperatives of accomplishing common ends"¹²⁹—that provided at least the source of what Fuller was to call the "forms and limits of adjudication."¹³⁰ The forms were the structures, the processes studied so carefully by the legal process scholars of the time;¹³¹ and the limits of adjudication were built into the reasoning process itself. Again Amar: "By paying strict attention to second-order rules allocating power between federal courts and other institutions, the legal process theorists sought to specify with precision the boundaries and purposes of federal judicial power. Once these boundaries and purposes were specified, federal judicial decisionmaking could be both legitimated and restrained."¹³²

Public law scholars employed these forms and limits to construct principles—intellectual rules of the road—to govern judicial decisionmaking. In this vein, the legal process movement aimed to instill norms of competence and principle into the interpretation, application, and creation of legal rules by judges. It hoped that reasoned elaboration of legal

127. Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688, 694 (1989).

128. See Vetter, *Postwar Legal Scholarship on Judicial Decisionmaking*, 33 J. LEGAL EDUC. 412, 414 (1983). See generally Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) [hereinafter Fuller, *Forms and Limits*]. Fuller's emphasis on the morality of process was particularly interesting in light of his general antipathy to certain positivistic views, most notably H.L.A. Hart's, of substantive law. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Vetter explains that "[n]otwithstanding [Fuller's] position, he said very little by way of novel judgment on the substantive outcomes legal institutions produced. It seems a fair inference that he found a standard of moral judgment in the contribution of institutional outcomes to a satisfaction of human wants, but what he mainly discussed was a morality of process." Vetter, *supra*, at 414.

129. Vetter, *supra* note 128, at 415. See L. FULLER, *THE MORALITY OF LAW* 33-41 (1964).

130. Fuller, *Forms and Limits*, *supra* note 128.

131. See, e.g., H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

132. Amar, *supra* note 127, at 694.

rules by carefully-constructed legal institutions would blunt much of the legal realist critique. Legal process scholars assumed that norms of judicial decisionmaking would follow from the craftsmanship of the interpreters and their commitment to skilled (and prudential) decisionmaking rather than some elusive commitment to objective legal reasoning. Moreover, this reasoned elaboration fit in nicely with the historical predicament faced by lawyers and judges in the post-war era. The historical context of Cold War era legal scholarship made the prospect of responsible, principled decisionmaking appealing as a descriptive element of American legal discourse for "articulation of the reasoning process in opinions highlighted the difference between a society, such as America, where law allegedly attempted to conform to public notions of reasonableness and fairness, and totalitarian regimes where law was synonymous with the fiat of officials."¹³³

The other side of the dilemma concerned the apparent inability of post-legal realist theorists to develop a justification for judicial power. Legal process theorists skillfully challenged the assumption that legal controversies inevitably pose a struggle over the right to make public policy, a struggle between the majoritarian institutions (Congress and the president) and the courts. In their legal process materials, Hart and Sacks craft a picture of legislative and judicial decisionmaking that stresses the collaborative nature of legal decisionmaking. The principal responsibility of political decisionmaking lies at the feet of the political branches, to be sure, but this decisionmaking is to be carried out in good faith ("reasonable persons pursuing reasonable purposes reasonably") and with full appreciation for the coordinate role of the courts. In Hart and Sacks' world, the courts are not barriers to political will but instead are faithful colleagues in the mutually constructive task of creating and implementing public policy.

Allocation of a degree of judicial power to courts forms part of a quid pro quo; in return, courts would agree to respect certain disciplining tenets. In that connection, Hart and Sacks admonished courts to:

1. Respect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers;
2. Respect the constitutional procedures for the enactment of bills;
3. Be mindful of the dependence of legislature upon the good faith and good sense of the agencies of authoritative interpretation;
4. Be mindful of the nature of language and, in particular, of its special nature when used as a medium for giving authoritative general directions;
- and 5. Be mindful of the nature of law and of the fact that

133. G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 143 (1978).

every statute is a part of the law and partakes of the qualities of law, and particularly of the quality of striving for even-handed justice.¹³⁴

These five commandments created a framework for circumscribed judicial power and thoughtful judicial restraint. It was an unabashedly aspirational conception of legal reasoning and decisionmaking; yet it provided a way out of the legal realists' dilemma: The legal process would succeed to the extent it operated on the basis of norms of professionalism and craftsmanship and on a reciprocal assumption of legislative and judicial good faith.

Since "the original thrust of Realism had been negative,"¹³⁵ the legal process school picked up where legal realism left off, providing a body of structural and institutional scholarship concentrating on the nature and practice of legal procedure.¹³⁶ The legal process writers took on the project of reexamining and, in some cases, reconceptualizing the foundations of legal institutions, adjudicatory methods, and the structure of judicial decisionmaking. Hence, the "action" in public law scholarship of this era was in the areas of federal jurisdiction, constitutional review and, to a lesser extent, administrative law.¹³⁷ For many of these procedural scholars, "[t]he critical focus of a truly 'legal' analysis came down to the question 'who decides?'—which institution's determination would govern in case of conflict."¹³⁸

The traditional legal process movement was criticized on a number of significant grounds. First, its neutral stance towards the substance of legislative and judicial policy seemed increasingly anachronistic in light of the larger movement away from moral relativism and consequentialist ethics in the 1960s and 70s.¹³⁹ Legal process writers were content to set moral judgments aside. The substantive morality of law was a topic best left to the jurists, while public law theorists concentrated on institutional and procedural scholarship.¹⁴⁰ While this does not suggest that process-oriented scholarship advocated, or was equivalent to, relativism, the school was criticized on similar grounds. Surely, the legal process claim that the structure of law "is (or can be) rational, objective, and

134. H. HART & A. SACKS, *supra* note 3, at 1410-11.

135. G. WHITE, *supra* note 133, at 141.

136. *See* Amar, *supra* note 127, at 691-92.

137. *See id.*

138. Peller, *supra* note 125, at 570.

139. The movement toward a reconstituted ethics to replace the relativistic vacuum characteristic of pre-1970s political philosophy can be charted, although not without appropriate caveats (and a discussion beyond the scope of this essay), from the publication of JOHN RAWLS, A THEORY OF JUSTICE (1971). The ferment caused by Rawls' work and that of his successors has generated a seemingly endless stream of interesting theoretical writings on law, politics, interpretation and similarly ambitious topics. *See* M. SHAPIRO, *supra* note 23, at 12 n.4 (describing "postconsequentialist" ethics and noting sources).

140. *See* Amar, *supra* note 127, at 691-92 (noting several key legal process articles).

neutral" (p. 327) seemed naive in light of the hard-fought struggles over deeply contentious issues of social policy and justice taking place in the post-war era. And, as Critical Legal Studies writers pointed out, it was far from apparent that any deontological process of reasoned elaboration could arrive at uncontroversial judgments about the nature and scope of legal rights, much less larger questions of social justice.¹⁴¹

Accordingly, the radical critique of the legal process movement stressed the contingent nature of law and legal reasoning, challenging, as did the Realists, the attempt to separate law from politics. Moreover, this critique squarely challenged the legal process attempt to create the structural and institutional conditions for Fuller's "morality of process" and Hart and Sacks' reasoned elaboration. Following the legal realists' teachings that the assumptions of objectivity and a priori reasoning underlying classical legal thought were inaccurate, the radical critique of legal process questioned the normative claim that law *should* be rational, neutral, and detached from politics.

A more subtle version of this same critique maintained that the legal process movement had managed to smuggle a sort of conservative formalism and, more importantly, conservative *values*, into their purportedly neutral scholarship.¹⁴² Professor Wechsler's infamous description of *Brown v. Board of Education* as an illegitimate constitutional decision reflected, said the critics, a decidedly substantive vision of equality, racism and, indeed, neutrality itself.¹⁴³ So long as process scholars perceived the social and legal structure of the United States as essentially fair and just, they could advocate a neutral (read: status quo-maintenance) theory of judicial review. Critics challenged this "benign view of American society within which the possibility of social domination had been defined away."¹⁴⁴ Gary Peller captures the basic critique: "There was no neutral way to distinguish between substance and process because the very same controversial substantive issues that made a theory of procedural neutrality attractive were always potentially implicated in determining the procedural legitimacy of any particular institutional decision."¹⁴⁵

Moreover, theories developed to defend principled legislative and

141. See M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 186-212 (1987); Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L. J. 223 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 80 YALE L.J. 1063 (1980).

142. See Peller, *supra* note 125, at 606-17.

143. See *id.* at 608-13; see also Singer, *supra* note 126, at 518-19 ("[Legal process] premises are more controversial than they think, and the process of generating conclusions from those premises is more indeterminate than they are willing to admit.").

144. Peller, *supra* note 125, at 607.

145. *Id.* at 615. See also Parker, *supra* note 141, at 236-57 (characterizing process theory as a "sophisticated apology for the truncated, systematically biased political life of our liberal welfare state.").

judicial decisionmaking rested on increasingly shaky assumptions about the legislative process. The legal process' assumption of good faith and reasonableness, albeit a more normative than empirical claim, appeared increasingly dubious in light of the public choice critique of recent years.¹⁴⁶ This critique described a legislature populated by re-election minded lawmakers concentrating not on the creation of wise public policy but, instead, on the production of legislation that would hopefully improve their own lot. In combination with traditional interest group theories of legislation, the public choice critique described the legislative process as a sort of mad bazaar consisting of warring interest groups, all struggling for a piece of the political pie. And while a number of scholars responded that this public choice portrait was a vastly oversimplified characterization of the legislative process,¹⁴⁷ the reality, even if less onerous than described by the public choice crowd, was considerably bleaker than the picture painted by Hart and Sacks on behalf of the legal process movement.

Notwithstanding the notoriety of the public choice critique, the true threat to the underpinnings of traditional legal process movement comes from the movement's traditional supporters. Mainstream pluralist political scientists, most notably Charles Lindblom¹⁴⁸ and Robert Dahl,¹⁴⁹ became increasingly reticent about the basic assumptions that have supported pluralism as an analytical theory of how the legislative process did and should work. Just as Dahl, Lindblom and others were led away from strong versions of pluralist theory toward a more complicated (and ultimately pessimistic) account of political participation and decision-making,¹⁵⁰ so, too, did legal scholars begin to critically examine, and

146. See *supra* notes 7-8.

147. The pure form of the public choice theory of legislation has been criticized in recent works including K. SCHLOZMAN & J. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); J. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (1984); A. MAASS, *CONGRESS AND THE COMMON GOOD* (1980); Rubin, *What We Expect of Legislators and What Legislators Expect of Themselves: A Critique of the Public Choice Analysis of Legislation* (unpublished manuscript on file with author); Farber & Frickey, *Public Choice*, *supra* note 4. See generally *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

148. See, e.g., C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT* (1965); R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* (1953).

149. See, e.g., R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

150. See, e.g., C. LINDBLOM, *POLITICS AND MARKETS* 170-200 (1977) (noting that privileged position of business vis-a-vis other groups undermines participatory democracy); R. DAHL, *DEMOCRACY IN THE UNITED STATES* 488 (3d ed. 1976) ("[t]hose who are better off participate more, and by participating more they exercise more influence on government officials"); Dahl, *Pluralism Revisited*, 10 COMP. POL. 191 (1978). The evolution of Lindblom and Dahl's views on pluralism is described in Parker, *supra* note 141, at 242-46. Besides Dahl and Lindblom, other important political scientists have levelled substantial criticisms at traditional pluralist theory. See,

often criticize, the assumptions underlying pluralist-inspired public law scholarship.¹⁵¹

Finally, the administrative state simply outgrew much of the insights developed by the legal process writers of two and three decades ago. The so-called "orgy of statuemaking"¹⁵² that characterized the post-New Deal era led Guido Calabresi to declare that we had entered an "age of statutes."¹⁵³ Whereas Hart and Sacks wrote of pre-New Deal statutes and statutory frameworks, the product of the modern legislative process proved considerably more complex. Hart and Sacks struggled to integrate the disparate patchwork quilt of statutes into the general fabric of law. They advocated, as had Landis before them,¹⁵⁴ and Calabresi later,¹⁵⁵ an essentially common law-like approach to interpreting statutes. But the checkerboard statutes characteristic of the 60's, 70's, and 80's made their elegant picture of the heroic judicial mind struggling to integrate a statute into the general fabric of the law untenable.

Despite these problems, the public law debate has continued to operate within this dominant paradigm without serious question. To this day, the leading casebooks in three of the principal public law fields are legal process-inspired.¹⁵⁶ Moreover, contemporary public law scholarship is also paradigmatic of legal process understandings. Indeed, as Joseph Singer remarks, "[t]he enduring power of the legal process approach appears even in writings of scholars not widely identified as adherents to this view."¹⁵⁷

It is into this public law arena that Eskridge and Frickey boldly step. The new legal process themes reflected in Eskridge and Frickey's legislation materials represent the most sustained challenge to the basic legal process paradigm, at least within the (arguable) mainstream of public law scholarship. To Eskridge and Frickey, it is precisely those themes that are so unsettling to the traditional legal process framework—anti-pluralism, creative lawmaking and interpretation, and dialogic government—that provide the raw materials for public law's reconstruction.

e.g., T. LOWI, *supra* note 24, 31-41; G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 119-54 (1966).

151. See, e.g., Parker, *supra* note 141, at 242-46; Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

152. G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

153. G. CALABRESI, *supra* note 53, at 1-8 (describing how current legal system is "choking on statutes"). See also G. GILMORE, *supra* note 152, at 95 (describing the "orgy of statute making").

154. See generally Landis, *Statutes and the Sources of Law*, HARVARD LEGAL ESSAYS 213 (1934).

155. G. CALABRESI, *supra* note 53, at 163-66.

156. See P. BATOR, D. MELTZER, P. MISHKIN, D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988); W. GELLHORN, G. BYSE, P. STRAUSS, T. RAKOFF, R. SCHOTLAND, ADMINISTRATIVE LAW (8th ed. 1987); G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985).

157. Singer, *supra* note 126, at 506.

IV

THE FUTURE OF THE NEW LEGAL PROCESS

The new legal process theory is, as should now be clear, not one theory at all but rather a collection of theories built around a set of themes central to contemporary public law scholarship. While Eskridge and Frickey might themselves be reluctant to claim a role for themselves as the “founding fathers” of this new legal process scholarship, they did, after all, write the book. Accordingly, we might organize most of this recent scholarship around the three themes they identify in the materials as central to the new legal process agenda: anti-pluralism, creative law-making by courts (and, to a lesser extent, agencies), and dialogue and conversation as a methodology of lawmaking and interpretation. The preceding three parts of this review essay have attempted to describe some of the principal elements of this agenda. This essay concludes with a few thoughts about where the new legal process may be heading as an intellectual movement.

A. Is the New Legal Process Really Anti-Pluralist?

A principal unifying theme in the new legal process scholarship is hostility to pluralist theories of law and politics.¹⁵⁸ Eskridge and Frickey note:

Typically, defenders of pluralism will now concede that interest group government sacrifices fairness, rational social choice, and/or other values but will argue that pluralism is justified by its facilitation of stability, moderation, and broad satisfaction with the political system. . . .

158. Neo-republican public law scholars have offered explanations of the Constitution's founding that integrate traditional federalist-pluralist understandings of politics in the nascent American Republic with antifederalist-republican theories that they claim found their way into the theories of the Constitution. This neo-republican history is not all of one cast. While Cass Sunstein offers Federalist No. 10 as an elegant fusion of pluralist and non-pluralist thought (which he labels “Madisonian Republicanism”), see Sunstein, *supra* note 2, at 45-48, Frank Michelman offers a sophisticated description of the framing as containing, at core, an optimistic faith in the potential of jurisgenerative politics and dialogic self-government. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507-13 (1988). The founding fathers, says Michelman, conceived themselves as not merely registers of private preferences—in this case the preference for a written Constitution of a certain design—but as co-participants “in a more encompassing common life, bearing the imprint of a common past, within and from which the arguments and claims arise and draw their meaning.” *Id.* at 1513.

None of this neo-republican scholarship amounts to a complete rejection of the role of pluralist political theory in the framing of the Constitution and in the design of the American political institutions. Nor do Eskridge and Frickey claim as much from this body of work. Their basic point is a discrete one: We cannot explain the structure and logic of the Constitution, the institutions designed thereby, nor the apparatus and process of our modern federal legislature by exclusive resort to pluralist theories of politics and law. The historical record simply does not support the picture painted by the extreme pluralists. *But see* T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988); Pangle, *Civic Virtue: The Founders' Conception and the Traditional Conception*, in *CONSTITUTIONALISM AND RIGHTS* (G. Bryner & N. Reynolds eds. 1987).

To the extent that it is mere apology for limited government subserving the status quo, it is unworthy, either because it ignores questions of justice or because it is an impoverished vision of community. Pluralism is philosophically grounded in a nineteenth century liberal view of humanity which emphasizes individual liberty/free choice and a utilitarian (greatest happiness for the greatest number) view of social policy (pp. 61-62) (citations omitted)

This broad-gauged critique describes some important truths about traditional analytical pluralism.¹⁵⁹ It is, however, important to clarify what Eskridge and Frickey are *not* saying. Their main gripe with pluralism centers on the conception of politics and legislation as a process whereby private, exogenous preferences, represented by various organized interest groups, are translated into public policy.¹⁶⁰ But pluralism offers more than this bleak view to the legislative process: It offers a full-bodied socio-political concept, describing collectivities of voluntary associations and diverse communities within the general polity.¹⁶¹ A theme running through analytical pluralism is the notion of the organic state populated by a series of private groups and associations each contributing to the fundamentally diverse character of the republic. And although pluralism is criticized as reflecting a dour conception of politics and human nature, "pluralism has a prior and deeper meaning, one in which the affirmative value of diversity is explicitly acknowledged and celebrated."¹⁶² Eskridge and Frickey's understandable attempt to get past traditional pluralism as a historical and analytical construct, should not blind us to the real values of pluralist theories of politics and approaches to political change.¹⁶³ Voluntary associations, cultural and political diversity, and overlapping checks and balances retain a powerful

159. Henry Kariel disagrees that pluralism is related to utilitarianism. On the contrary, "[t]he pluralists," notes Kariel, "reacted against nineteenth-century liberalism and utilitarianism which had placed the individual in a social vacuum, abstracting him from his associations and making him the sovereign calculator of his interests. Here the pluralists realized that such a detached individual was all too quickly coerced and reintegrated by Bentham's sovereign legislator and Austin's positive law." Kariel, *Pluralism*, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 165, 165 (D. Sills ed. 1968) (citations omitted).

160. Eskridge articulates his own set of criticisms of pluralism in Eskridge, *Public Values*, *supra* note 4, at 1070-73.

161. The recognition of the value of culturally and politically diverse voluntary groups and associations is as old as political theory itself. See generally Chapman, *Voluntary Association and the Theory of Pluralism*, in NOMOS XI: VOLUNTARY ASSOCIATIONS 87, 89-90 (J. Pennock & J. Chapman eds. 1969) (chronicling the origins of pluralist theory).

162. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 301 (1988). See also Rapaczynski, *supra* note 2, at 404-05.

163. John Chapman describes the pluralist ideal: "Articulation through voluntary and private associations permits a resilient rationality to the politics of a society, offers its members the satisfactions of both cooperative and competitive achievement, and works to stabilize their common conceptions of justice." Chapman, *supra* note 161, at 91.

appeal in a legal and political system all too susceptible (as history demonstrates) to ethnocentrism, chauvinism, and self-satisfaction.

This broader notion of pluralism is, while largely missing from Eskridge and Frickey's account of legislation, not at all inconsistent with the thrust of their new legal process theory. On the contrary, notions of differentiation and diversity are quite congenial, and necessary, to a conception of law and politics as a process of dialogic self-government.¹⁶⁴ Complex notions of pluralism as diversity and "difference" have been explored in much contemporary legal scholarship, particularly in feminist legal theory,¹⁶⁵ and one would expect that the second generation of new legal process scholarship by Eskridge and Frickey and others will concentrate more on the interrelationship between contemporary political institutions (especially the legislature) and the increasingly heterogeneous character of American society.

B. *New Legal Process as Judicial Process*

"What is striking about many new legal process thinkers," say Eskridge and Frickey, "is not only their substantive commitment to progressive, fair, and just law, but also their faith in the judicial process to contribute to such law."¹⁶⁶ At one level this faith is necessary; so long as courts are charged with the principal responsibility to define and shape critical public values, albeit in the course of deciding "cases or controversies," new legal process scholarship will address itself to judges. But faith in the judicial process must ultimately be grounded in something more tangible than a concession to the hegemony of courts and judge-made law. What is the basis of new legal process confidence that judges, armed with scholarly insights, will be superior contributors to "progressive, fair, and just law?"

The comparative institutional competence argument is a familiar one in public law discourse.¹⁶⁷ The allocation of decisionmaking power

164. Having said that, there remains a troubling sense of ambivalence in new legal process theory regarding the potential conflict between a court-centered, and hence ultimately elitist, approach to progressive public law and the broader conception of social and political pluralism described above. Kathleen Sullivan makes this point with respect to the civic republican revival. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713 (1988). She expresses skepticism about the potential of neo-republicanism to come to terms with community values and voluntary groups. "Voluntary associations," says Sullivan, "thus put[] republicans in a bind. Republicans cannot easily embrace them because of their irreducible partiality. But republicans cannot wholly reject them because they are among the only settings for community around." *Id.* at 1721. This is a powerful dilemma, not only for the neo-republicans described by Sullivan, but also for the strong defenders of the new legal process brand of national decisionmaking and judicial activism.

165. See, e.g., Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987).

166. Eskridge & Frickey, *Legislation Scholarship*, *supra* note 4 at 723.

167. See, e.g., Pierce, *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions*, 77 *GEO. L. J.* 2031, 2040-47 (1989) (describing form and function of

and responsibility in government is built upon a principle of comparative advantage, a principle built in turn on the assumption that certain institutions are better suited than others to perform particular tasks. Any form of institutional decisionmaking must continually be justified by resort to these principles and norms; and it remains the burden of new legal process scholarship to so justify judicial hegemony, whether in the form of judicial review¹⁶⁸ or interpretation of statutes.¹⁶⁹

Beyond the issue of comparative competence is the constitutional question whether the new legal process scholars' faith in courts is consistent with the underpinnings of separation of powers doctrine and theory.¹⁷⁰ Although the study of statutory interpretation is avowedly non-constitutional, "[a]ny theory of statutory interpretation is at base a theory about constitutional law [for] [i]t must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation."¹⁷¹ Whether a theory of statutory interpretation must take the constitutionally-prescribed set of institutional roles and procedures as it finds them or whether the theory itself may generate a corresponding theory concerning the legitimacy of these roles and procedures is a central question for the new legal process. Moreover, it is, at its core, a separation of powers question.¹⁷²

Eskridge and Frickey and the other new legal process scholars are clearly working toward a way out of these separation of powers difficulties with their emphasis on dialogue and deliberation as a superior

comparative institutional analysis); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

168. Recent contributions to the debate over which institution in the federal system is the most appropriate one to interpret the Constitution include L. FISHER, *supra* note 49; R. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

169. The debate over which institution is best suited to interpret statutes has gathered steam as a result of the controversy in administrative law doctrine regarding whether courts should exercise independent judgment when interpreting statutes that delegate certain lawmaking power to administrative agencies or whether they should exercise much more limited judgment, instead deferring to the interpretive decisions of those agencies charged with administering these statutes. See, e.g., Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985).

170. See Froomkin, *supra* note 6, at 1091-94 (criticizing new legal process' failure to come to grips with structural features of the Constitution).

171. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988).

172. One of the points I tried to make in Part II.C concerning the paradox imbedded in Eskridge's theory of statutory interpretation is that the sources of his "dynamic" theory cannot generate, in any meaningful sense, a theory of divided and limited governmental powers. But it is precisely such a theory that must instruct us as to "ultimately what it means to speak authoritatively in a legislative or in a legal-interpretive voice." *Id.* at 1687.

method of lawmaking and interpretation.¹⁷³ This emphasis on deliberation raises the final challenge to new legal process thinkers, that of reconciling a mode of decisionmaking which is fundamentally normative with the precepts of our legal system which rests on positivistic premises.

C. *New Legal Process and the Brooding Omnipresence of Natural Law*

Perhaps the most striking feature of the new legal process's emerging theory is its endorsement of natural law. The new legal process vision of law, Eskridge and Frickey tell us, is "a carefully defined natural law vision" (p. 334).¹⁷⁴ Elsewhere, Eskridge and Frickey note that "[t]he legitimacy of law derives not from its formal source, but rather from its capacity for enlightening us and advancing the moral and economic dialectic of our society. Law is conversation rather than coercion" (p. 333).

However appealing is Eskridge and Frickey's vision of deliberative law, we should periodically remind ourselves that, whatever else be the potential of law as part of a jurisgenerative community of principle,¹⁷⁵ law *is* coercion. As Robert Cover has noted, "[l]aw is that which licenses in blood certain transformations while authorizing others only by unanimous consent."¹⁷⁶ Central to understanding legislation as process as well as the product of the decisions made by elected representatives and unelected judges is the notion that what is at stake in the decisions made by government officials is the structure of rights, duties, and benefits created by law. How the process is and should be carried out is, to say the least, exceedingly complex. But the positivistic premise, the notion that law is ultimately the binding command of the sovereign, provides the starting point for most contemporary theories of law and legal interpretation. This is not to suggest that legal positivism should be taken for

173. This deliberation theme has found its way into much of recent public law scholarship. See, e.g., M. SHAPIRO, *supra* note 22, at 18-35, 176 n.11; B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 349-78 (1980); Michelman, *supra* note 2, at 76-77; Sunstein, *supra* note 2, at 45-48; Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *YALE L.J.* 1617 (1985).

174. The apparent source of Eskridge and Frickey's anti-positivism is Robert Cover's elegant description of jurisgenesis and communities of interpretation. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos & Narrative*, 97 *HARV. L. REV.* 4 (1983). In a recent book review, Eskridge waxes enthusiastic about Cover's "positive vision of law" describing Cover's world as "one of rich and amazing natural law." Eskridge, *Metaprocedure* (Book Review), 98 *YALE L.J.* 945, 970 (1989).

175. The phrase "jurisgenerative community of principle" mixes together two independent ideas identified with Robert Cover and Ronald Dworkin respectively, two very different thinkers. This admixture is intentional. Eskridge and Frickey build much of their conceptual structure around the insights of these two pathbreaking scholars.

176. Cover, *supra* note 174, at 9. See generally Cover, *Violence and the Word*, 95 *Yale L. J.* 1601, 1609 (1986) (emphasizing that "[l]egal interpretation takes place in a field of pain and death").

granted but merely that Eskridge and Frickey will have a difficult journey ahead of them if they reject the building block of legal positivism and sovereign law for an inchoate natural law vision.¹⁷⁷

Moreover, there are practical problems with Eskridge and Frickey's endorsement of natural law as the polestar for new legal process theory. The authors' reliance on a natural law assumption seems oddly incommensurate with, for example, their study of statutory interpretation. When the courts confront a question of statutory meaning, they consider a set of instructions issued by a sovereign designate directed toward controlling individual or group conduct or administering a government program. What makes a *statute* the subject of concern instead of, say, the United Nations Declaration of Human Rights or the San Francisco yellow pages, is that the statute has an *a priori* claim to obedience that other writings do not. This claim to obedience is importantly positivistic; it derives from democratic and contractarian norms that bear no necessary relation to a scheme of natural law. "Ultimately the question is," says Alex Aleinikoff, "what is the most plausible meaning today that [the statute's] words will bear."¹⁷⁸

If the new legal process is simply the latest natural law theory on the block, the project may ultimately disappoint. Carefully crafted theories of statutory interpretation, republican theories of judicial review, techniques for dealing with the problem of statutory obsolescence, and the rest of the new legal process story as told through Eskridge and Frickey's legislation materials is just so much window dressing if the legitimacy and workability of the legislative process and its product turns on its commensurability with some inchoate natural law vision. The Panglossian picture of legisprudence as the task of recovering objective moral reality from public legislative activity may be superior metaphysics but

177. In contrast, Eskridge makes the claim that the original legal process framework described by Hart and Sacks "reveals both positivist and natural law elements." Eskridge, *Metaprocedure*, *supra* note 174, at 963. The attempt to link traditional legal process with natural law is a key theoretical move, but the claim made in Eskridge's review is sketchy and inadequately supported. *See id.* at 962-64. Eskridge notes that Hart and Sacks described law as a "purposive activity," and concludes from this that there were significant natural law elements in the project. While this theme of intelligible and purposive law was a normative assumption central to the task assigned to judges by the legal process framework, it was not, as Eskridge makes out, a description of some sort of independent, pre-political legal order generating binding norms and rules as a consequence of its natural law bedrock. Nor was Hart and Sacks' description tantamount to the sort of jurisgenerative community of interpreters described by Cover. In Hart and Sacks' world, law *is* coercion. And it is incumbent on good faith judges, engaging in reasoned elaboration, to channel such coercion toward its best (or least onerous) uses. The core insight of legal process is that solutions to the "basic problems of social living" will emerge from the synergies associated with the process itself and not from any *a priori* natural law claim.

178. Aleinikoff, *supra* note 56, at 60 (emphasis in original).

we might question the degree to which it can contribute to the serious study of legal institutions and the judicial role.¹⁷⁹

V
CONCLUSION

With the new legal process we, as public law scholars, now have a scholarly agenda—an unfinished agenda and perhaps a flawed agenda—but a conceptual agenda nonetheless. Like the legal process school that came before, Eskridge and Frickey's efforts hold the promise of reinvigorating a crucial, yet long moribund field. As Judge Posner points out, Eskridge and Frickey have the makings of a book which provides for public law scholars of this generation what the Hart and Wechsler cases and materials on federal courts provided for the original legal process scholars of the early 1950s.¹⁸⁰ The book has brought along with it a provocative new look at a very old subject. Public law studies and legal education will be the richer for it.

179. I understand Eskridge and Frickey's project to involve an intellectual effort to develop a foundational basis for the new legal process themes they endorse. Eskridge, as I noted at the end of Part II, *see supra* note 123, is developing a theory of statutory interpretation around the insights of Gadamer. It remains to be seen whether Eskridge will mine from Gadamer or others insights relevant to other aspects of legislative scholarship. *See Eskridge, Dynamic Statutory Interpretation, supra* note 4, at 1509-10. Frickey's work with his colleague Daniel Farber indicates that his views on public law are developing out of currents in modern pragmatism and practical reason scholarship. *See Farber & Frickey, Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987).

180. Posner, *supra* note 5, at 1571.

